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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAMAEL DUMAS, Defendant and Appellant.	B208971 (Los Angeles County Super. Ct. No. BA308074)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed as modified.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Yun K. Lee and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jamael Dumas appeals from a judgment of conviction entered after a jury found him guilty of second degree murder (Pen. Code, § 187, subd. (a)) and found true the allegation he personally used a firearm in the commission of the crime (*id.*, § 12022.53, subd. (d)). The trial court sentenced defendant to state prison for 15 years to life for the murder and an additional 25 years to life for the firearm use.

On appeal, defendant claims evidentiary, instructional and sentencing errors. We agree that defendant is entitled to presentence custody credits and correct the judgment accordingly. In all other respects, we affirm.

FACTS

Prosecution

About 11:15 a.m. on January 6, 2006, Latarisha Baylor (Baylor), her 13-year-old son, Cardearo Baylor (Cardearo), and a 19-year-old family friend, Terry Warren (Warren), went to the Legal Aid office located at 8th Street and Union Avenue in Los Angeles. While Baylor stood on the sidewalk smoking a cigarette, Cardearo and Warren crossed the street and went into a thrift store. After Cardearo and Warren left the thrift store and waited to cross the street, Baylor went into the Legal Aid office.

As Cardearo and Warren crossed the street, defendant and a girl were crossing from the other side. Defendant bumped his shoulder into Warren's shoulder. Warren asked him, "Are you going to say excuse me or something?" Defendant responded, "Do you know where you at? This is my territory." Warren said he did not care whose territory it was, he was just going to buy some pants.

Defendant asked Warren where he was from. Warren answered that he was from MCS, meaning Mid-City Stoners. Defendant pushed Warren. Warren took off his necklace and handed it to Cardearo. He asked defendant if he was going to fight.

Defendant said, "Yeah, we going to fight." At this point, defendant and Warren were "in each other's face."

Defendant told the girl with him to give him a jacket. After about a minute of argument between defendant and Warren, defendant pulled a handgun from the jacket pocket. Warren told Cardearo to go get his mother. Cardearo began backing up, until he was about 10 feet behind Warren. Defendant extended his arm and, without saying anything, fired one shot. Defendant and Cardearo looked at one another, then defendant and the girl ran away.

Cardearo ran to the Legal Aid office yelling for his mother. Baylor came outside and found Warren on the ground, trembling and gasping for breath. He then died.

Charlie Tangtanalit (Tangtanalit) was cleaning the sidewalk in front of his store on Union Street when he observed three young men standing together. He recognized one of them as defendant, who he had seen around the neighborhood and in his store. He saw defendant remove an object from his pocket or waistband. Defendant pointed a gun at one of the other two. Tangtanalit heard a gunshot, and then he saw one of the other two fall to the ground. The other young man ran across the street to the Legal Aid office then returned with a woman. Tangtanalit did not hear any arguing or see the young man who was shot move before defendant fired the gun.

Alex Barrios (Barrios) was riding in a car stopped at a red light on Union Avenue by Eighth Street. He saw two young men and a young woman who appeared to be arguing. One of the young men appeared to be more aggressive. The other stepped back, then the more aggressive one pulled a gun from his waist area and shot the other one. Barrios called 911 as the car in which he was riding drove away.

At about 5:30 p.m. that evening, Los Angeles Police Detective Matthew Gares was conducting a surveillance on East 71st Street. At about 7:00 p.m., Detective Gares saw defendant crouching down behind a car in the driveway. Defendant then jumped up and ran across the street. Another officer followed and placed defendant under arrest.

Officer Jason Abner took defendant to the police station for booking. Defendant told Officer Abner that the gun he used was at a friend's house. He would not give the

officer his friend's address but said he would call his friend and have the friend put the gun outside where the police could get it.

An autopsy revealed that Warren died of a gunshot wound to the chest from a small to medium caliber bullet. The absence of stippling indicated that he had been shot from a distance of more than two feet.

Defense

On the night of January 5, 2006, defendant, who was then 15 years old, slept in the stairwell of an apartment building near 7th Street and Valencia Street. He had a small handgun that he kept for protection against gang members who had been giving him problems. In the morning, he met his friend Alvaneisha Wiley (Wiley), who was staying nearby. He gave the gun to Wiley to hold in case he was stopped by the police.

As defendant and Wiley were walking down Union Avenue, he saw Warren and Cardearo crossing the street toward them. Defendant and Warren began "mad-dogging" each other; they never bumped into one another. Warren asked defendant, "What's up, Cuz. You know me from somewhere?" Defendant responded, "Where would I know you from?" Warren asked him, "Where you from?" Defendant said he was from "Tree Top Piru," a Compton gang, although he was not a gang member. Warren told him, "Cuz, I'm Watts."

Warren came close to defendant, and defendant pushed him away. Warren said they were going to fight and began removing his shirt and chain. Defendant was afraid he would be beaten up by Warren and Cardearo. He looked at Wiley, who handed him her jacket, in which she had hidden his gun. Defendant took out the gun and pointed it at Warren in order to get Warren to back off. Warren began yelling at defendant, asking, "You going to shoot me?" He said that defendant was not going to do anything. Warren took a couple of steps toward defendant, and defendant fired the gun. Defendant then ran away and dropped the gun down the sewer.

Defendant did not intend to kill Warren. He intended to get Warren to back off, so that he could get away safely.

After his arrest, defendant was interviewed by the police.[1] He first told them that he was with "Maria" at 8th Street and Union Avenue when he heard a gunshot. He saw two men and a man with a woman. The man who was with the woman ran. Defendant and "Maria" ran too. According to defendant, the man who ran looked like he could have been defendant's twin.

After the police encouraged him to tell the truth, defendant admitted that he was walking with a girl when Warren and Cardearo "banged" on him. Defendant told them he was a Tree Top Piru member. Warren or Cardearo drew a knife. Defendant wanted to leave, but they said they knew where he hung out and would kill him later if he did not fight with them. Defendant then shot Warren accidentally.

Defendant then said he would tell the police what happened. He encountered Warren and Cardearo while he was walking down the street. Warren got "all in [his] face" and drew a knife. Defendant pushed him back and told him he had "something that's bad for your health." When Warren tried to get to him with the knife, defendant shot him. When the police asked defendant to identify the woman who was with him, defendant asked them not to "make me snitch on my homies," as it was against the "G code." Eventually, he identified her as "Avanisha."

The police told defendant that a video from a camera at a nearby business showed that there was no knife involved in the encounter. Defendant said he would tell the truth. He and "Avanisha" were walking down the street when they encountered Warren and Cardearo. They "eyeballed" one another, then defendant pushed Warren. Warren threatened him. Defendant shot Warren, but the shooting was accidental and unintended. Defendant acknowledged that Warren did not have a knife.

According to defendant, he lied during the interview because he was afraid and felt that the police were going to arrest him no matter what he said. Defendant claimed that his testimony was the truth.

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1 The interviews were tape recorded and played for the jury.

Defendant acknowledged that in a judicial proceeding in 2003, he admitted committing assault with a deadly weapon. In 2004, he admitted committing grand theft person.

Detective Jeff Breuer interviewed Cardearo two times. During the first interview, Cardearo did not mention defendant bumping Warren or defendant asking Wiley for the jacket. He also said that he was running away when the shot was fired. Cardearo did not say anything about defendant bumping Warren until shortly before trial.

During the second interview three days later, Cardearo said that he saw the shooting. He added to his statement that Warren told defendant he was a member of the Mid-City Stoners.

DISCUSSION

Impeachment with Evidence of Defendant's Prior Offenses

Prior to defendant's testimony, the prosecutor sought to be able to impeach him with the conduct that resulted in his two prior juvenile adjudications: an assault with a knife in 2003 and grand theft in 2004. Defendant objected on relevance and due process grounds. He also objected under Evidence Code section 352 that the evidence would be more prejudicial than probative. Defendant also requested that, if the court allowed admission of evidence of the prior conduct, it would sanitize it and allow the prosecutor to ask only if defendant had committed acts of moral turpitude. The trial court allowed impeachment with the priors, overruling defendant's objections and finding that the evidence was more probative than prejudicial.

Defendant then testified that in prior judicial proceedings he had admitted committing an assault with a deadly weapon and grand theft person. The trial court instructed the jury pursuant to CALCRIM No. 226 that in judging a witness's credibility, it could consider whether the witness had "admitted certain crimes in prior judicial proceedings."

Defendant contends the admission of his unsanitized prior offenses violated his right to a fair trial. He further contends that, at the very least, the trial court should have allowed his impeachment with only one of the prior offenses, grand theft person, the one most dissimilar to his current offense.

The trial court has broad discretion to admit or exclude evidence of acts of dishonesty or moral turpitude relevant to impeachment under article I, section 28, subdivision (d) of the California Constitution. (*People v. Wheeler* (1992) 4 Cal.4th 284, 293; *People v. Castro* (1985) 38 Cal.3d 301, 312-313.) This rule extends to conduct resulting in prior juvenile adjudications. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1740; see also *In re Manzy W.* (1997) 14 Cal.4th 1199, 1209.)

Even if the evidence is otherwise admissible, the trial court must, on request, weigh the probative value of the evidence against its prejudicial effect under Evidence Code section 352. The trial court's ruling under Evidence Code section 352 will not be disturbed absent a clear showing of abuse of discretion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65; *People v. Adams* (1980) 101 Cal.App.3d 791, 799; *People v. Kelley* (1977) 75 Cal.App.3d 672, 678.) The ruling will not be overturned simply because a different inference may be drawn from a review of the facts. (*Stewart*, *supra*, at p. 65.)

Defendant does not contend that his prior conduct was inadmissible for impeachment purposes. Rather, he contends that the evidence should have been sanitized, i.e., that the jury should have been told only that he had engaged in prior conduct which was a crime of moral turpitude or an act involving dishonesty. In the alternative, he asserts that the jury should have been told only about the prior grand theft, since the prior assault was similar to the instant charge and therefore prejudicial.

It is true that where the prior conduct is similar to that charged, there is a greater potential for prejudice in its admission. The jury is more likely to conclude that if the defendant was guilty of the prior conduct, he is guilty of the charged conduct. (*People v. Barrick* (1982) 33 Cal.3d 115, 126.) As the Supreme Court has concluded, however, sanitizing the prior conduct does not necessarily alleviate the potential for prejudice. It "conclude[d] that the technique, while having a superficial appeal as an acceptable

accommodation of the competing interests of the prosecution and the defense, does not avoid creating a 'substantial danger of undue prejudice.' (Evid. Code, § 352.)" (*Barrick*, *supra*, at p. 127.) There remains a danger that the jury will speculate that the prior conduct was identical to the charged offense and conclude that if the defendant committed the crime before, he is likely to have done it again. (*Ibid*.)

Here, if the jury was told that defendant engaged in conduct involving moral turpitude and dishonesty resulting in judicial proceedings, it would not necessarily have been less prejudicial. The main question here was not whether defendant shot Warren but what his intent was in doing so, specifically whether he shot Warren because he believed it was necessary to do so in self-defense. Knowing that defendant previously committed acts involving moral turpitude and dishonesty would not necessarily make it more likely that the jury would believe defendant than if it knew he had previously committed an assault with a deadly weapon and grand theft person.

In any event, any error in refusing to sanitize the prior convictions was harmless. The evidence of defendant's prior conduct, which amounted to no more than a brief mention, was far less damaging to his credibility than the evidence that when he was interviewed by the police, he kept changing his story when he was caught in a lie, and whatever story he told them was designed to minimize his culpability. Additionally, other witnesses, notably Tangtanalit and Barrios, who had no reason to lie, saw defendant shoot Warren when Warren had either stepped back or was standing still. This evidence contradicted defendant's claim that he had to shoot Warren in self-defense. It is not reasonably probable that defendant would have received a more favorable result had the evidence of his prior conduct not been admitted. (Cal. Const., art. VI, § 13; *People v. Barrick*, *supra*, 33 Cal.3d at p. 130.)

Failure to Instruct on Heat of Passion Voluntary Manslaughter

The trial court instructed the jury pursuant to CALCRIM No. 571 as to voluntary manslaughter based on imperfect self-defense as a lesser included offense of murder.

Defendant contends the trial court had a sua sponte duty to instruct the jury as to voluntary manslaughter based on sudden quarrel or heat of passion.

The trial court has a duty to "instruct on lesser offenses necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citation.] On the other hand, if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1063-1064.)

Voluntary manslaughter is the "unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion." (Pen. Code, § 192, subd. (a).) An unlawful killing also may be voluntary manslaughter where malice has been negated by an honest but unreasonable belief the defendant's life was in imminent danger from the victim. (*People v. Blakeley* (2000) 23 Cal.4th 82, 88; *People v. Lasko* (2000) 23 Cal.4th 101, 108.)

A killing "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)) occurs "'if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'"'" (*People v. Lasko*, *supra*, 23 Cal.4th at p. 108.) The offense has both a subjective and an objective component. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

Defendant argues that there was substantial evidence of sufficient provocation to justify an instruction on voluntary manslaughter resulting from a sudden quarrel or heat of passion. Defendant fails to point to substantial evidence that his reason was actually obscured, however. To the contrary, he points to his testimony that he believed "he was going to get jumped by" Warren and Cardearo. He looked at Wiley, who handed him her jacket with the gun inside. He pointed the gun at Warren to get him to back off. When Warren moved closer to him, he fired. Absent substantial evidence of subjective heat of passion, the trial court was not required to instruct the jury sua sponte on voluntary

manslaughter resulting from a sudden quarrel or heat of passion. (*People v. Steele, supra,* 27 Cal.4th at p. 1252; *People v. Kraft, supra,* 23 Cal.4th at pp. 1063-1064.)[2]

Imposition of Penal Code Section 12022.53 Weapons Enhancement

Defendant contends that imposition of a 25 years to life weapons enhancement pursuant to Penal Code section 12022.53, subdivision (d), violates both the proscription against multiple punishment (Pen. Code, § 654) and the constitutional protections against double jeopardy (U.S. Const., 5th & 14th Amends.). His contentions have been rejected by the California Supreme Court. (*People v. Sloan* (2007) 42 Cal.4th 110, 114, 120-121; *People v. Izaguirre* (2007) 42 Cal.4th 126, 128-129, 134.) Inasmuch as we are bound by the pronouncements of our Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we reject defendant's contentions as well.

Presentence Custody Credits

Defendant contends, and the People agree, that he is entitled to presentence custody credits. While a defendant convicted of murder is not entitled to presentence conduct credits (Pen. Code, § 2933.2; *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1431-1432), he is entitled to credit for the actual time spent in custody (Pen. Code, § 2900.5; *People v. Taylor* (2004) 119 Cal.App.4th 628, 645-647). The People concur in defendant's calculation of the credit to which he is entitled as 889 days. Since a judgment which fails to award such custody credit is unauthorized and may be corrected at any time, we will make that correction. (*Taylor, supra,* at p. 647.)

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[2] Inasmuch as the instruction was not justified by the evidence, defendant was not deprived of the effective assistance of counsel by his attorney's failure to request the instruction. (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

DISPOSITION

The judgment is affirmed. Defendant is awarded 889 days of presentence custody credit. The trial court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.